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No. 80-391

In the Supreme Court of the United States

OCTOBER TERM, 1980

GEOFFREY AKERS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner seeks review of the decision below upholding the Commissioner of Internal Revenue's disallowance of his charitable contributions deduction for 1974 to the extent that it exceeded $78.

The pertinent facts may be summarized as follows: Petitioner was a member of the First Church of Christ, Scientist, both in Boston, Massachusetts, and in New London, Connecticut. On his 1974 federal income tax return, he reported gross income of $24,225.31 and claimed a deduction for charitable contributions of $8,675, of which $8,565 represented alleged donations to the two churches in Boston and New London. Petitioner attached to his income tax return an itemized list, compiled after the end of the year in issue, of specific cash contributions made to the two churches on each Sunday of the year. The Commissioner disallowed all but $78 of

the deduction because petitioner failed to substantiate it adequately and issued a notice of deficiency. Petitioner sought a redetermination of this deficiency in the Tax Court which upheld the Commissioner's disallowance on the ground that petitioner had not met his burden of proving that he had in fact contributed the amount claimed. The court of appeals affirmed (Pet. App. A).

Section 170(a)(1) of the Internal Revenue Code of 1954 (26 U.S.C.) allows a deduction for charitable contributions, provided they are verified under regulations prescribed by the Secretary of the Treasury. The regulations provide that "[a]ny deduction for a charitable contribution must be substantiated, when required by the district director, by a statement." 26 C.F.R. 1.170A-1 (iii). Here, petitioner presented no proof, other than his uncorroborated testimony and a list compiled after the end of the year in issue, that he had made any contributions, much less that he had contributed in excess of the $78 allowed by the Commissioner. The lack of any documentation or independent support for the donations justified the Tax Court's ruling that petitioner did not meet his burden of proving his deductions.

Petitioner first contends that he satisfied the substantiation requirement under the rule of *Cohan* v. *Commissioner*, 39 F. 2d 540 (2d Cir. 1930). In *Cohan*, the court allowed a deduction for an approximation of business expenses in the absence of detailed documentation. But the regulation applicable to charitable deductions precludes such approximation. Furthermore, the rationale of *Cohan* is not applicable here because it permits a deduction in the absence of exact documentation only if the taxpayer first establishes that he had in fact spent an amount exceeding the

deduction allowed by the Commissioner. Here, petitioner did not prove that his donations exceeded $78, the amount allowed by the Commissioner.

Petitioner also argues that the substantiation requirement violates his rights under the Free Exercise Clause of the First Amendment. But in so contending, petitioner confuses his right, protected by the First Amendment, to donate to the church of his choice, with his privilege, granted by legislative grace through the Internal Revenue Code, to deduct such contributions when computing his taxable income. It is beyond question that the privilege of claiming a charitable deduction can be conditioned on adequate proof without violating petitioner's constitutional rights. *E.g., Hearde* v. *Commissioner,* 421 F. 2d 846 (9th Cir. 1970).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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